SUNWAY D'MONT KIARA SDN BHD v. PESURUHJAYA KHAS CUKAI PENDAPATAN & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[JUDICIAL REVIEW NO: 25-179-10-2014 & 25-185-10-2014]
22 DECEMBER 2016

CIVIL PROCEDURE: *Judicial review – Application – Application to quash decision of Special Commissioners of Income Tax ('SCIT') – SCIT rejected applicants' applications for extension of time to lodge notices of appeal – Whether applicants able to show reasonable cause that they were prevented from filing notice of appeal – Whether there was failure by SCIT to give reasons for rejecting applicants' application – Whether decision suffered from infirmities of illegality, irrationality and procedural impropriety – Income Tax Act 1967, s. 100(2), (4) & (5)*

REVENUE LAW: *Income tax – Appeal – Special Commissioners of Income Tax ('SCIT') rejected applicants' applications for extension of time to lodge notices of appeal – Whether applicants able to show reasonable cause that they were prevented from filing notice of appeal – Whether there was failure by SCIT to give reasons for rejecting applicants' application – Whether decision suffered from infirmities of illegality, irrationality and procedural impropriety – Income Tax Act 1967, s. 100(2), (4) & (5)*

CIVIL PROCEDURE: *Judgments and orders – Binding effect – Retrospective effect – Cases decided in 2004 relied on cases decided in 2006 and 2013 – Whether allowed – Whether against public policy*

There were two judicial review applications by Sunway D'Mont Kiara Sdn Bhd ('Case No. 179') and Halik Sdn Bhd ('Case No. 185'). The parties agreed that Case No. 179 would be the lead case and its outcome would be applicable to Case No. 185. The applicant in Case No. 179, a property developer, received compensation amounting to RM14,628,603.38 for the compulsory acquisition of two pieces of land belonging to the applicant by the State Authority. The applicant then filed their tax returns dated 19 July 2004 for 2003 year of assessment ('YA'). The compensation received was treated as a result of the acquisition of their land as taxable income. In 2013, the applicant discovered that *Ketua Pengarah Hasil Dalam Negeri v. Metacorp Development Sdn Bhd* ('*Metacorp*') had fully endorsed the decision in *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Anor* ('*Penang Realty*') which ruled that the gains arising from the compensation received for compulsory acquisition of land were not subject to income tax as the element of compulsion vitiates the intention to trade. The applicant then filed an application, *via* Form N, for an extension of time to file the notice of appeal for the 2003 YA but the application was dismissed by the Inland Revenue

A Board ('the Board'). The Board submitted the applicant's Form N application and the Board's statement to the Special Commissioners for Income Tax ('the SCIT'). The SCIT rejected the applicant's application for extension of time pursuant to s. 100(5) of the Income Tax Act 1967 ('the ITA'). Hence the present applications for judicial review to quash the decisions of the
B SCIT. The issues that arose were (i) whether the applicant was able to show reasonable cause that the applicant was prevented from filing the notice of appeal as envisaged by s. 100(2) of the ITA; (ii) whether there was failure by the respondent to give reasons for rejecting the applicant's application; (iii) whether *Metacorp* and *Penang Realty* could be applied retrospectively;
C and (iv) whether the decision suffered from infirmities of illegality, irrationality and procedural impropriety.

Held (dismissing applications):

(1) The applicant employed an afterthought strategy to try to wriggle its way to the court for justice when the applicant itself had sat on its right for
D a good nine years. *Penang Realty* was decided in 2006 and the least the applicant could have done was to file for extension of time around the year 2006 when the decision of the court in *Penang Realty* was announced by the court. The reason given by the applicant that it had no knowledge of the decision in *Penang Realty* could not be accepted.
E The applicant was no ordinary person but a big enterprise with all the resources to seek legal advice from any established legal firm. Ignorance of the law was no excuse. (paras 33-35)

(2) In exercising the discretion under s. 100(2), (4) and (5) of the ITA, the respondent was not required by the ITA to provide reasons for their
F decisions. However, the respondent had set out in detail the grounds upon which the applicant's application was rejected. The respondent had taken into consideration all the relevant facts and had applied the law correctly before rejecting the applicant's application. (paras 42 & 47)

G **(3)** It would be absurd and against public policy for the applicant to rely on cases decided in 2006 and 2013 to apply to the factual matric of this case which was decided in 2004. If the respondent and/or the court were to allow this to happen, this would lead to a floodgate for all litigants to apply for extension each time cases involving their rights were decided by the court differently from the earlier decisions of the court. There
H would be no finality in the decisions and the whole judicial process would be in a total mess. As such, later decisions of the court would not have any retrospective effect and these decisions would only be binding on future cases. (para 57)

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(4) The respondent had acted within the powers given to the respondent by the ITA. The respondent had not committed any errors of law and fact by considering irrelevant matters and/or had ignored crucial matters in arriving at his decision. (paras 61 & 63)

Case(s) referred to:

Caslow Kilkenny Radio Ltd v. Broadcasting Commissioner [2003] 3 IR 528 ***(refd)***

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ Rep 504 HC ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Darahman Ibrahim & Ors v. Majlis Mesyurat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Datuk Syed Kechik Syed Mohamad v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ Rep 159 SC ***(refd)***

Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Manusia & Anor [2008] 1 LNS 231 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2015] 9 CLJ 179 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Metacorp Development Sdn Bhd (Civil Application No: 08(F)-371-2011 (W)) (Unreported) ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal [2006] 2 CLJ 835 CA ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

R v. Inland Revenue Commissioners, ex p SG Warburg & Co Ltd [1994] STC 518 ***(refd)***

R v. Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 ***(refd)***

R v. Jockey Club, ex p RAM Racehorses Ltd [1993] 2 All ER 225 ***(refd)***

R (on application of Browallia Cal Ltd) v. General Commissioners of Income Tax for the City of London [2004] BTC 204 ***(refd)***

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 99(1), 100(1), (2)(b), (4), (5)

Rules of Court 2012, O. 53 r. 3

Specific Relief Act 1950, s. 41

Taxes Management Act 1970 [UK], s. 49(1)

For the applicant - Mr Jason Tan; M/s Lee Hishamuddin Allen & Gledhill

For the respondent - Shamsul Bolhassan & M Kogilambigai; SFCs

Reported by Najib Tamby

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JUDGMENT

Asmabi Mohamad J:

Introduction

B **[1]** There were two judicial review applications ("JR applications") fixed for hearing before me, Case No. 25-179-10-2014 involving the applicant known as Sunway D'Mont Kiara Sdn Bhd ("Case No. 179") and Case No. 25-185-10-2014 involving the applicant known as Halik Sdn Bhd ("Case No. 185"). In these JR applications, the applicants had sought, amongst others, to quash the decisions of the Special Commissioners for C Income Tax ("SCIT") who had rejected the applicants' applications for extension of time to lodge notices of appeal to challenge the notices of assessment for the year of assessment ("YA") 2003.

[2] In addition to the above, the applicants had also sought leave for an order that time for the lodgment of the notice of appeal to challenge the D notice of assessment for the YA 2003, is extended for a period of one week from the date of the order for the extension is given by this court.

[3] The applicants further sought a declaration that the respondent to be bound and shall give effect to the Federal Court decision in *Ketua Pengarah Hasil Dalam Negeri v. Metacorp Development Sdn Bhd vide* Civil Application E No: 08(F)-371-2011 (W)) ("*Metacorp*") and the Court of Appeal decision *vide Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835 ("*Penang Realty*") which held that gains arising from compensation for compulsory acquisition of land are not subject to income tax as the elements of compulsion vitiates the intention to trade.

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[4] At the outset of the hearing of these two JR applications, learned counsel for the applicant had prayed for these two cases to be heard together as the facts and the law involved were the same. It was agreed by both parties that Case No: 179 which was decided by the learned SCIT, Puan Khatijah Mahmud, shall be the lead case and the outcome of the decision in Case G No: 179 would be applicable to Case No: 185, which was decided by the learned SCIT, Tuan Mohamed Saman bin Mohd Ramli.

[5] I had acceded to the request and proceeded to hear Case No: 179 first. Upon perusal of the cause papers, the applicable laws, the written H submissions filed by both parties and upon hearing oral arguments by both learned counsel, I dismissed both the JR applications with costs.

[6] Aggrieved by my decisions, both the applicants appeal to the Court of Appeal, Malaysia against the said decisions.

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Background Facts

Case No: 179

[7] The facts leading to the filing of the JR application had been narrated by the respective parties in the affidavits filed herein as well as in the written submissions. In order to save judicial time, the salient facts as narrated by the parties are reproduced herein and where necessary with some amendments as follows:

(a) The applicant's principal activity is property development. The applicant received compensation amounting to RM14,628,603.38 for the compulsory acquisition of two pieces of land belonging to the applicant by the State Authority.

(b) On 19 July 2004, the applicant filed their tax returns dated 19 July 2004 for 2003 YA. The applicant had treated the compensation received as a result of the acquisition of their land as taxable income.

(c) In 2013, the applicant discovered that *Metacorp* had fully endorsed the decision in *Penang Realty* which ruled that the gains arising from the compensation received for compulsory acquisition of land are not subject to income tax as the element of compulsion vitiates the intention to trade.

(d) On 29 April 2013, the applicant filed an application *vide* Form N for an extension of time to file the notice of appeal for the 2003 YA (see exh. "KM3" of encl. 11).

(e) On 16 December 2013 the Inland Revenue Board ("the Board") rejected the applicant's application *vide* a statement dated 16 December 2013 (see exh. "KM4" of encl. 11).

(f) In December 2013, the board submitted the applicant's Form N application and the board's statement to the SCIT which was received by the SCIT on 16 December 2013 (see exh. "KM3" of affidavit in reply of Puan Khatijah binti Mahmud, the SCIT in the JR application (encl. 11)).

(g) On 27 December 2013, the applicant submitted a written representation dated 26 December 2013 supported by an affidavit (see exh. "KM3" of encl. 11) urging the respondent to approve the applicant's Form N application and to grant the applicant the extension of time.

(h) On 24 January 2014, the board filed an affidavit in reply to the applicant's representation (see exh. "KM6" of encl. 11).

(i) On 7 July 2014, the SCIT had rejected the applicant's application for extension of time pursuant to s. 100(5) of the Income Tax Act 1967 ("ITA"). This decision was communicated to the applicant's solicitors on 14 July 2014 (see exh. "KM1" of encl. 11).

(j) On 10 October 2014, the applicant filed this JR application.

Grounds Of Challenge

[8] The applicant had mounted their attack on the decision of the respondent based on all the possible grounds applicable in a judicial review proceeding ie, illegality, irrationality and procedural impropriety. These grounds could be found in the applicant's statement under O. 53 r. 3 of the Rules of Court 2012 filed herein (encl. 2).

The Issue For The Court's Determination

[9] There is only one issue for this court's determination as follows:

> Whether the decision of the Respondent not to allow the Applicant's application for extension of time to file notice of appeal to challenge the notice of assessment for the 2003 YA is correct in law and fact?

The Law On Judicial Review

[10] In hearing this judicial review application I reminded myself that this is not an appeal against the decision, action and omission of the respondent but a judicial review of its decision, action and omission. The governing principle in judicial review is that the review is restricted to the decision-making process, and not the merits, substance or justification of the decision in question. Therefore, it is not the function of this court at this stage to look at the correctness of the decision, action or omission but rather with the way the decision, action and omission was arrived at.

[11] There is also plethora of cases on point, which had delved on the functions of the court in exercising its judicial review powers. Suffice for me to quote the very often quoted decision of Lord Roskill in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] 1 AC at p. 374 as follows:

> ... This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, 1174, "is not an appeal from a decision, but a review of the manner in which the decision was made."

(see *Caslow Kilkenny Radio Ltd v. Broadcasting Commissioner* [2003] 3 IR 528; *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ Rep 159; [1991] 1 MLJ 417; *Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Manusia & Anor* [2008] 1 LNS 231; [2009] 6 MLJ 402).

[12] I have also reminded myself that it is settled law to qualify as a subject for judicial review, the decision, action and/or omission must have the effect of altering the rights or obligations of the applicant and deprive the applicant of some benefit or advantage (see *Council of Civil Service Unions & Ors v. Minister for the Civil Service (supra)* 1 AC at p. 374).

[13] I am also guided by the principles of the Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2015] 9 CLJ 179 where His Lordship Abu Samah Nordin JCA (as His Lordship then was) in delivering the judgment of the court, held as follows:

> [21] There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker. Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process: ... The Federal Court in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 had clarified that the decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 that the court could substitute its own view to that of the Industrial Court should only be exercised in the most appropriate of cases. The same view was expressed in a subsequent decision of the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

[14] Mindful of my role as a judge exercising my judicial review powers, I will focus on the manner the decision, action and/or omission was allegedly made or omitted to do by the respondent and examine if the decision, action and/or omission was tainted with what Lord Diplock described in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* (*supra*) 1 AC at p. 374 as "illegality", "Irrationality" and "procedural impropriety". I will also examine the factual matrix of the case at hand to see if this is a fit case for this court to substitute the decision of the SCIT with its own decision.

The Specific Law - Income Tax Act 1967 (ITA)

[15] For the purpose of the case at hand the relevant law applicable is the ITA.

[16] Section 100(1) of the ITA provides an avenue for a person who desires to file a notice of appeal against an assessment made against him, beyond the 30 days provided in s. 99(1) of the ITA, by making an application for extension of time using Form N Application, which is to be submitted to the Director General of Income Tax ("DG"). Section 100(1) provides as follows:

> (1) A person seeking to appeal against an assessment may at any time make to the Director General a written application in the prescribed form for an extension of the period within which notice of appeal against the assessment may be given under subsection 99(1).

[17] Section 100(2) gives a discretion to the DG to grant an extension of time to any person who desires to file a notice of appeal against any assessment made against him, if the DG is satisfied that there exists any reasonable cause which had prevented the applicant from giving notice of appeal within the time frame stated in s. 99(1) of the ITA.

[18] Section 100(2) states:

> (2) On receipt of an application under subsection (1), the Director General:
>
> (a) If he is satisfied that for any reasonable cause the applicant was prevented from giving notice of appeal within the appropriate period provided by subsection 99(1), shall extend that period as he thinks proper in the circumstances and give written notice of the extension to the applicant;
>
> (b) If he is not so satisfied, shall forward the application to the clerk, together with a statement of the reasons for his dissatisfaction and his address for the purposes of the application.
>
> (3) Where the Director General forwards an application and statement pursuant to paragraph (2)(b), he shall inform the applicant in writing that he has done so and shall furnish the applicant with a copy of the statement; and the applicant may, within twenty-one days of receiving the information and the copy, forward to the Clerk written representations as to the application and any statement.

[19] Section 100(4) gives the discretion to the SCIT to decide whether to grant an extension of time to the applicant to lodge a notice of appeal against any assessment, if the SCIT thinks it is proper given the circumstances of the case at hand. Whilst s. 100(5) provides that the decision of the SCIT in refusing an application for extension of time to be notified to the applicant by the clerk. It further provides that the decision is final.

[20] Section 100(4) & (5) are as follows:

> (4) Any application and statement forwarded pursuant to paragraph (2)(b) and any representations forwarded pursuant to subsection (3) shall be brought by the Clerk to the attention of one of the Special Commissioners, who shall decide whether or not to extend as he thinks proper in the circumstances the period within which the notice of appeal may be given.
>
> (5) The decision of one of the Special Commissioners refusing an application or granting an extension under subsection (4) shall be notified in writing by the Clerk to the applicant and the Director General and shall be final.

The Issues Raised By The Respective Parties

By The Applicant

[21] Learned counsel for the applicant had raised, amongst others, the following issues:

(i) The respondent is not immune from judicial review. The courts have granted leave to challenge the respondent's decision.

(ii) The English courts in the case of *R (on application of Browallia Cal Ltd) v. General Commissioners of Income Tax for the City of London* [2004] BTC 204 had ruled that the decision of the General Commissioners under s. 49(1) of the English Taxes Management Act 1970, which is similar to s. 100(1) of the ITA is amenable to judicial review. In exercising the courts' discretion to extend time, amongst others, the following factors must be considered:

(a) there is a reasonable excuse for not observing the time limit;

(b) the applicant must show that he had acted promptly after becoming aware of the facts justifying the extension;

(c) whether there is element of prejudice to any party if the late appeal is allowed to proceed;

(d) whether there are considerations affecting the public interest; and

(e) whether the delay has attracted the quality of the evidence.

(iii) Based on the decisions in *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 2 MLJ 713 ("*Lower Perak*"), *Penang Realty* and *Metacorp*, the applicant has substantive merits to challenge the decision of the DG to impose tax on the compensation derived from compulsory acquisition of land. The respondents had failed to consider the principles enunciated in the above-mentioned cases when rejecting the application.

(iv) The applicant has reasonable excuse for not lodging the notice of appeal within the prescribed time. The respondent failed to consider the reason given by the applicant for not filing the notice of appeal timeously. In their written representations to the SCIT, the applicant had intimated that they had no knowledge of the decision in *Penang Realty* as the judgment was not reported and the Court of Appeal in *Penang Realty* was yet to deliver its judgment. It was impossible for the applicant to have foreseen or known that the Federal Court would rule in favour of the taxpayer.

(v) There is no legal or factual basis for the Board to raise the issue that there was failure on the part of the applicant to appeal within the prescribed period stated in s. 99(1) upon the issuance of the notice of assessment for YA 2003. All the above factors could not be foreseen by the applicant at that material time.

(vi) In any event, in this case, the applicant had acted promptly in making the JR application as soon as they became aware of the decision in *Metacorp*.

(vii) The application for extension was made *bona fide*. If the application is rejected the applicant will be greatly prejudiced as the applicant would have lost all rights to appeal. The granting of the application for extension would not prejudice the respondent in any manner as they would have every opportunity to defend the decision.

(viii) The DG's decision to subject the compensation to tax is defective, *ultra vires*, without jurisdiction and illegal. The DG's refusal to abide by the decision in *Lower Perak* (*supra*), *Penang Realty* and *Metacorp* constitutes serious breach of the principles of natural justice.

(ix) The applicant had provided all the relevant information and documents pertaining to the taxation of compensation for compulsory acquisition of land to the Board.

(x) The respondent had failed to consider that the Board's decision *vide* its statement dated 16 December 2013 to reject the application for extension of time to file notice of appeal is without any legal or factual basis and merit.

(xi) The Board in exercising its discretion must take into account relevant factors and considerations. Such discretion should not be exercised at its whim and fancy but must be exercised after due consideration of all relevant facts and circumstances.

(xii) The issue pertaining to taxation of compensation for compulsory acquisition of land is a question of law and not a matter of general practice.

(xiii) If the applicant's application is not allowed, the DG's decision to subject the compensation to tax despite the decisions of *Lower Perak*, *Penang Realty* and *Metacorp* will result in unjust enrichment.

(xiv) There was denial of the legitimate expectations of the applicant that the respondent and DG will take cognizance of the superior courts' decisions as mentioned above.

For The Respondent

[22] The learned Senior Federal Counsel had, amongst others, raised the following issues:

(a) There is no requirement for the respondent to provide the applicant with the reasons for the decision. It is not statutorily prescribed in the ITA. The respondent had provided the reasons for rejecting the application in paras. 24, 25, 26 of the respondent's affidavit.

(b) The doctrine of legitimate expectation is not applicable to the case at hand. There was no express promise from the respondent. Neither was there regular practice adopted by the respondent which the applicant can reasonably expect to continue.

(c) The applicant had not shown that there was representation made by the respondent which was clear, unambiguous and devoid of qualification and/or that the applicant fell within the class of persons to whom this representation was made and it was reasonable for the applicant to rely on that representation to the applicant's detriment.

(d) There were no good reasons to extend time. The reason given by the applicant that it was affected by Decision Impact System ("DIS") introduced by the respondent in 2006 could not be true as the decision of the Court of Appeal in *Penang Realty* was made on 26 April 2006, two years after the assessment with respect to YA 2003 was made. The applicant filed its assessment on 19 July 2004 almost two years before DIS was introduced.

(e) At the material time when the assessment was made, there was nothing to stop the applicant from appealing against the decision of the DG pursuant to s. 99(1) of the ITA.

(f) Based on the reasons given by the applicants as stated in its written representation, the applicant's case is not a proper case for the respondent to exercise its discretion in granting an extension of time. The respondent did not merely depend on the possibility that there were merits in the applicant's appeal.

(g) The applicant had not shown cogent and reasonable grounds that they were prevented from giving notice of appeal within the appropriate period stipulated in s. 99(1). The assessment was raised on 19 July 2004 based on the applicants' own calculation in Form C which was voluntarily submitted and the particulars were agreed to by the applicant. There was no appeal filed within the 30 days period as stipulated in s. 99(1). The application for extension of time *vide* Form N was made on 22 April 2013, almost nine years after the time within which the applicant ought to have filed its notice of appeal.

(h) The applicant made no attempts to challenge the DIS and/or file notice of appeal within the time-frame stated in s. 99(1), notwithstanding the DIS. Despite the DIS, there were cases that came to court to raise similar issues.

(i) The reason that it had no information pertaining to the decisions in *Penang Realty* and/or *Metacorp* is not a good ground to seek for extension of time to file notice of appeal against the decision that was made in 2004. The applicant could have acted immediately after the decision in

Penang Realty in 2006 and not wait until 2013 when the decision in *Metacorp* was delivered by the Federal Court. The applicant is a big enterprise with all reasonable resources and could very well afford legal advice.

(j) The prayer in term of a declaration is only a discretionary relief. In any event, it is premature for the applicant to seek this remedy as the issue before the court is the decision of the respondent in refusing to grant an extension of time to file the notice of appeal and not the merits of the appeal.

(k) The court must exercise the power to grant a declaration 'sparingly' and 'with great care' and 'jealously'. The court must consider the utility, the usefulness of the declaration on one hand as against the inconvenience and embarrassment that may result on the other hand.

(l) The decisions of the courts in foreign jurisdiction are not binding on the Malaysian courts. Even the decision in the English case quoted by the applicant had set out the pre-conditions to be satisfied by the applicant before an extension could be granted.

Discussion Of The Issues And Decision Of The Court

[23] Bearing in mind of the above said principles, upon perusal of the cause papers, the written submissions of all the relevant parties herein and upon hearing learned counsels for the applicant and the respondent respectively and upon giving this matter a serious consideration these are the reasons for my decision to dismiss the applicant's application *vide* encl, 6 with costs.

Issue 1: Whether the applicant was able to show reasonable cause that the applicant was prevented from filing the notice of appeal as envisaged by Section 100(2) of the ITA

[24] It would be appropriate at this juncture for the court to examine the cause advanced by the applicant to justify its application for extension of time, which according to the applicant had prevented the applicant from filing its notice of appeal under s. 99(1) of the ITA. This could be gauged in exhs. "KM2", "KM3" & "KM4" in encl. 11.

[25] Exhibit "KM2" was the letter from the DG's office to the SCIT intimating to the SCIT that the DG had considered the applicant's application for extension of time and was not satisfied with the cause advanced by the applicant for not complying with the 30 days period stated in s. 99(1) to file appeal against the assessment imposed against it.

[26] Exhibit "KM3" annexed to encl. 11 was Form N filed by the applicant on 22 April 2013, about nine years from 19 July 2004, the date the applicant filed the tax return for 2003 YA.

[27] The applicant had annexed lampiran 1 to provide the reasonable cause which had prevented the applicant from filing the notice of appeal for YA 2003. In para. 2(d) of lampiran 1 the applicant stated that it had discovered recently that the Federal Court had made a ruling on the issue of tax relating to compensation derived from land acquisition which had endorsed the decision in *Penang Realty* decided in 2006.

[28] The applicant contended that the respondent had taken the position that the compensation for compulsory acquisition was not subject to income tax. It was the ruling in *Metacorp* that compulsory acquisition of land could not be considered as sale as the element of compulsion vitiates the intention to trade.

[29] According to the applicant, this was confirmed by the DG himself when the Board issued DIS stating the stance taken by the Board not to abide by the decision in *Penang Realty*. Hence the applicant contended that the DG had requested and encouraged the applicant to subject the compensation to income tax.

[30] The DG had filed his statement under s. 100(2)(b) of the ITA giving his reasons for rejecting the applicant's application for extension of time to file the notice to appeal. In essence, the DG was not satisfied that the reasons given by the applicant for not filing the notice of appeal were cogent and reasonable that could have prevented the applicant from filing the notice of appeal.

[31] The DG found that the main reason given by the applicant was because the DIS issued by the DG had prevented the applicant from doing so. The DG was of the view that the DIS had not in any way prevented the applicant from filing the notice of appeal within the prescribed period.

[32] The applicant could have filed its notice of appeal within the prescribed period if it had wanted to do so, as there was nothing to stop the applicant from doing so. If the applicant was not satisfied with the DIS, it could challenge the validity of DIS and/or simultaneously filed in its notice of appeal. The applicant chose to abide by the DIS, therefore the applicant should be prevented from blaming the DIS for the delay in the filing of the appeal against the assessment for 2003 YA.

[33] Obviously this was an afterthought strategy employed by the applicant to try to wriggle its way to the court for justice when the applicant itself had sat on its right for a good nine years.

[34] The issue for the court to consider is whether the act of the applicant to wait for the judgment in *Metacorp* which was still "blooming" and or "brewing" or something which was going to happen in the future to justify the late application for extension, should be accepted by any reasonable decision maker. More so in the factual matrix where there was already a

decision on point *vide* the decision in *Penang Realty* which was decided in 2006, reported in [2006] 2 CLJ 835. The least the applicant could have done was to file for extension around the year 2006 when the decision of the court in *Penang Realty* was announced by the court or challenge the DIS.

[35] The reason given by the applicant that it had no knowledge of the decision in *Penang Realty* could not be accepted as the applicant is no ordinary person but a big enterprise with all the resources it could have to seek legal advice from any established legal firm. The applicant could not rely on the ground that it had no knowledge of the decision in *Penang Realty* as the reason it could not file the appeal sooner as ignorance of law is no excuse.

[36] Therefore, the reason the applicant was prevented from filing the notice of appeal within the prescribed time because it was prevented by DIS could not be sustained as DIS was issued two years after the assessment of 2003 YA by the applicant. Obviously around the time of the assessment, the applicant could not be influenced by the DIS which was issued by the DG in 2006. In exercising his discretion under s. 100(2) of the ITA, the DG found that there were no reasonable grounds to prevent the applicant to file the notice of appeal within the prescribed period stipulated in ITA.

[37] The learned SCIT had stated in encl. 11 her grounds for rejecting the applicant's appeal against the decision of the DG to deny the applicant the extension it sought to file the notice of appeal. All the facts which I had alluded herein were within the knowledge of the respondent and had been dealt with meticulously by the learned SCIT in encl. 11.

[38] On the totality of the evidence placed before the SCIT, I observe that both the DG and the SCIT had assiduously followed the procedure outlined in s. 100 of the ITA when exercising their discretion under the said provision. I could not detect any flaws in the decision making process which warranted this court's intervention by way of a *certiorari*.

[39] Therefore, on this ground alone this appeal ought to be dismissed.

[40] In the event I am wrong in my appreciation of the facts and the law herein, for the sake of completeness I will also delve with other issues raised by the applicant.

Failure To Give Reasons

[41] The next ground relied by the applicant was that there was failure on the part of the respondent to provide reasons for the decision to reject the applicant's application for extension of time to file notice of appeal against the assessment. There were no reasons provided to the applicant for rejecting the applicant's application for the extension of time as there is no duty prescribed statutorily for the respondent to do so.

[42] A perusal of the ITA showed that in exercising the discretion under s. 100(2), (4) & (5) of the ITA, the respondent is not required by the ITA to provide reasons for their decisions. This principle was reiterated in a plethora of cases. In the Federal court case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777) quoted by the learned SFC the court held:

> There cannot be any breach of duty when none exists in law

[43] There is a plethora of cases which resolved that if the law does not expressly provide for reasons to be given, then the decision maker is not obliged to give his reason and/or be faulted for not giving his reasons so long as the decision maker had acted within the four corners of the law which regulates his power.

[44] Suffice for the court to refer to the recent Federal Court decision in the case of *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd* 01(F)-18-08-2012 dated 29 November 2016, where the Federal Court held that:

> [87] The Court of Appeal criticised the appellant for not providing reasons for its decision to the respondents, and opined that by such failure to be open, the court could conclude that the appellant had no good reasons in making the impugned decision ...
>
> [91] Guided by those persuasive cases, judicial interference therefore should be on a case by case basis. As regards this appeal, we also find no statutory provision that demands the appellant to supply reasons why the first respondent is duty bound to pay the withholding tax. Apart from the want of a statutory provision demanding the supplying of reasons, in the circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous.

[45] It was made even clearer by the supporting judgment of YA Tan Sri Datuk Zainun Ali where Her Ladyship held as follows:

> The correct application of the law concerning the duty of administrative authorities to give reasons for decisions has been explained by the Privy Council in *Dr Stefan v. The General Medical Council* (1999) 1 WLR 1293. It must be emphasised that the law does not impose a general duty upon decision makers to give reasoned decisions. The trend of the law is towards giving reasons, but on a case by case basis. Among the determining factors when reasons ought to be given by administrative decision makers lie in the nature and character of the decision making and when the giving of reasons will be required as a matter of fairness and openness.

[46] Based on the Federal Court's pronouncement above, the absence of reasons for a decision when there is no duty to give reasons, in itself cannot support the suggestion that the decision is irrational. The court has to take

a further step and scrutinise all the other facts and/or circumstances placed before it and ask itself whether these facts and circumstances point overwhelmingly in favour of a different decision. If the answer is in the affirmative then the decision maker who has given no reason for his decision cannot complain if the Court draws inference that he has no rational reason for his decision (see *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665).

[47] In any event, a close scrutiny of the affidavits filed herein, I observe that the respondent had set out in detail the grounds upon which the applicant's application was rejected. I have attempted to discuss these grounds in the preceding paragraphs herein. I found that the respondent had taken into consideration all the relevant facts placed before her and had applied the law correctly before rejecting the applicant's application. With the facts placed before the learned SCIT, no reasonable tribunal and/or decision maker similarly circumstanced could have arrived at a different decision.

[48] I am satisfied there is no merit in this ground of challenge and accordingly rejected it.

Legitimate Expectation

[49] The applicant further contended that it had a legitimate expectation that the DG and the respondent would consider the judgments in *Lower Perak*, *Penang Realty* and *Metacorp* in dealing with its application for extension of time.

[50] For the applicant to rely on this doctrine, the applicant must show that there was an express promise by the respondent and/or a regular practice adopted by the respondent which the applicant can reasonably expect to continue (see *Council of Civil Service Unions & Others v. Minister for Civil Service* [1985] AC 375; *Darahman Ibrahim & Ors v. Majlis Mesyurat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538).

[51] For the applicant to succeed on this ground of challenge, the applicant must show the requirements giving rise to a legitimate expectation must be present which are similar to the requirements of estoppel in private law (see Bingham J in *R v. Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569H to 1570B; per Stuart-Smith LJ in *R v. Jockey Club, ex p RAM Racehorses Ltd* [1993] 2 All ER 225 at 236h-237b; and per Hidden J, in *R v. Inland Revenue Commissioners, ex p SG Warburg & Co Ltd* [1994] STC 518 at 535 c to j and 541j to 542a).

[52] A close examination of the affidavits filed herein, I found that there was nothing shown by the applicant which could suggest that the Board and/or the respondent had made some form of representation which was

clear, unambiguous and devoid of qualification that the applicant's application *vide* Form N would be allowed on the basis of *Metacorp* which had endorsed *Penang Realty*.

[53] Based on the aforesaid, this ground of challenged must fall.

Application for Declaratory Order is Premature

[54] A declaration is only a discretionary relief. The prayer sought by the applicant was premature as the issue before the court is the decision of the respondent in refusing to grant an extension of time to file the notice of appeal to enable the applicant to challenge the tax return for YA 2003. The applicant had not crossed the first hurdle to get the extension to file the notice of appeal to the DG before seeking the prayer for a declaration. The court must exercise the power to grant a declaration 'sparingly' and 'with great care' and 'jealously'. "In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on one hand as against the inconvenience and embarrassment that may result on the other hand." (see s. 41 of the Specific Relief Act 1950); *Datuk Syed Kechik Syed Mohamad v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101; *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1987] 2 CLJ 36; [1987] CLJ (Rep) 504; [1988] 2 MLJ 604).

Whether The English Cases Quoted By The Applicant Are Applicable

[55] The decisions of the courts in foreign jurisdiction are not binding on the Malaysian courts. A perusal of the English case quoted by the applicant would show that there are a few pre-conditions to be fulfilled before an extension of time is granted to an applicant to file the notice of appeal. The case quoted showed that the applicant still has to provide reasonable excuse for not bringing the appeal within the stipulated time. What is reasonable excuse is very subjective depending on the facts of each case.

[56] Based on the grounds advanced by the applicant, it is my humble view that the applicant had not met with the threshold for leave for an extension of time to be granted.

Metacorp And Penang Realty Could Not Be Applied Retrospectively

[57] Based on basic common sense, it would be absurd and against public policy for the applicant to rely on cases decided in 2006 and 2013 to apply to the factual matrix of this case which was decided in 2004. If the respondent and/or this court were to allow this to happen, this would lead to a floodgate for all litigants to apply for extension of time each time cases involving their rights were decided by the court differently from the earlier decisions of the court. There would be no finality in the decisions and the whole judicial process will be in a total mess. As such later decisions of the court will not have any retrospective effect and these decisions will only be binding on future cases.

[58] The importance of the court to consider public policy in applying judicial precedents was decided in the Federal Court case of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 where the court held that:

> It is now universally recognised that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of 'judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law'. When rules run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.

[59] Therefore, it would be against the public policy to allow the applicant to rely on a case decided in 2013 to request for extension of time to challenge the decision of the DG to impose tax in 2004. To allow so would lead to judicial chaos and anarchy.

Whether The Decision Suffers From Infirmities Of Illegality, Irrationality And Procedural Impropriety

[60] My task at this juncture is to undertake a critical examination of the facts and the law and to decide if the decision of the respondent suffers from infirmities of illegality, irrationality and/or procedural impropriety both in terms of process and substance to merit curial intervention.

[61] As shown in the preceding paragraphs, I am satisfied that the respondent had not committed any errors of law and fact by considering irrelevant matters and/or had ignored crucial matters in arriving at his decision.

[62] At the end of it, all the questions which this court would have to ask itself are whether a reasonable person similarly circumstanced would have come to the same decision on the facts before it (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235).

[63] On the totality of the evidence before me, I was satisfied that the respondent had acted within the powers given to the respondent by ITA.

[64] I had indicated at the outset, both parties had agreed that the decision in Case 179 will be binding on Case 185 filed herein by Halik Sdn Bhd as the issues, factual matrix and the applicable law are similar in nature. Therefore, based on the same reasons encl. 5 was also dismissed with costs of RM5,000.

Conclusion

[65] In view of the aforesaid and upon a careful consideration of the facts placed before me, upon reading the relevant provisions of the ITA, I am satisfied that the decisions of the respondents did not suffer from infirmities of illegality, irrationality and/or procedural impropriety which merit curial intervention. Based on the aforesaid the applicants' application are dismissed with costs. In the course of making this decision other points raised by the learned SFC herein had been considered.

[66] After hearing a short submission on the issue of costs, I had allowed costs of RM5,000 for each case to be awarded to the respondent.

[67] For the above-mentioned reasons, I dismissed the applicants' JR applications *vide* encls. 5 and 6 with costs.